In The

Supreme Court of the United States

October Term, 1979

No. 79-6182

RICHARD GRAHAM,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

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Supreme Court, U. S.
FILED
APR 14 1980
MICHAEL RODAK, JR., CLERK

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Section 120.80 (4)
Section 140.15

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OPINIONS BELOW

The opinion of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department is reported at 69 A.D. 2d 544, 419 N.Y.S. 290. The opinion of the Sullivan County Court denying the suppression motions of petitioner and Richard Lucas is reported at 90 Misc. 2d 1019, 396 N.Y.S. 2d 966. Both of the referred to opinions are attached to the petition.

JURISDICTION

The jurisdiction of this Court to review the judgment below rests on 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Did the arrest of the petitioner comply with the Fourth Amendment of the United States Constitution standards of reasonableness?

2. This case is clearly distinguishable from People v. Payton and Riddick 45 N.Y. 2d 300 which is currently pending before this Court.

3. The evidence seized upon the arrest of the petitioner in his motel room had independent sources as contemplated by Silverthorne Lumber Co. v. United States 251 U.S. 385 (1920).

4. Did the Appellate Division, Third Department, correctly apply to the motel search the harmless error doctrine of People v. Crimmins 36 N.Y. 2d 230 and Chapman v. California 386 U.S. 18?

5. Did the Court properly determine the admissibility of the petitioner's confession under the Fourth, Fifth and Fourteenth Amendments of the United States Constitution?

6. Did the Appellate Division, Third Department, properly determine the admissibility of evidence coming from the search warrant executed upon the co-defendant's automobile?

FACTS

The facts of this case are set forth in great detail in the Trial Court's opinion which is located at 90 Misc. 2d 1019, 396 N.Y.S. 2d 966 through 969 (1977). Additionally, the facts were further summarized by the Appellate Division, Third Department in their opinion at 69 A.D. 2d 544, 419 N.Y.S. 2d 290 through 292 (1979).

The petitioner sets forth a statement of the case and, without getting into great detail, some exceptions to that statement are in order. Taking them in the sequence that they appear in the petitioner's statement, they are as follows:

(1) The Trial Court and the Appellate Division, Third Department, found that the arresting officers believed at the time of their entry into the petitioner's motel room that an arrest warrant had in fact been issued in the State of New York. This fact was evidenced by the reception of teletype messages to the Florida authorities working with the New York State Police confirming that the arrest of the petitioner and his co-defendant should be made for the crimes of murder, kidnapping and robbery and this confirmation occurred the evening prior to the arrest. (RA 13-23)

(2) The petitioner's statement implying that the police lacked information concerning the Doberman Pinscher dog's whereabouts with respect to the motel room is incorrect. The evidence proved that the police earnestly believed that the Doberman Pinscher dog was located within the motel rooms. This was evidenced by the testimony of one of the arresting officers wherein he wrapped a towel around his arm prior to entry for his protection. These facts were credited by the Trial Court and the Appellate Division. (RA 213-214)

(3) The petitioner's contention that the evidence taken from the motel room was utilized against him in the taking of the confession is incorrect and not substantiated by the evidence found by the Trial Court. Only the petitioner testified to its use. The police officers that questioned the petitioner were not the ones doing the inventorying of the property and they testified that none of it was shown to the petitioner during any of the questioning proceedings.

The petitioner has attached as Appendices F and G a purported list

of the property recovered from the co-defendant's vehicle and the motel rooms after arrest. The list, as it is portrayed in the appendix, is extremely misleading since it is given completely out of context with respect to the manner in which the items were seized. The petitioner has gratuitously separated the items seized into individual papers and exhibits tremendously inflating the actual number of items obtained. (For example, the police obtained the petitioner's wallet at the motel arrest. This wallet is reflected by a listing of each individual item found within it, rather than listing a single exhibit.)

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

I

The New York State Appellate Division, Third Department, held that the arrest of the petitioner by the police was based upon probable cause, the good-faith belief that an arrest warrant was issued, exigent circumstances and statutory authority permitting a warrantless and noticeless entry for the purpose of effectuating this arrest. That decision is in conformity with New York State, Federal and Constitutional standards.

In Ker v. California 374 U.S. 23, 31 the Court made it clear that their prior decisions were not to be construed as an:

> "...assumption by this Court of supervisory authority over state courts, cf. Cleary v. Bolger 371 U.S. 392, 401 (1963), and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law."

The Court went on to state at Page 34 that:

> "The States are not thereby precluded from developing workable rules governing arrests searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain".

In Ker v. California, Supra, the Court upheld an arrest performed in almost the identical fashion as was done in this case.

It was an arrest effectuated pursuant to State statutes allowing noticeless entry upon exigent circumstances through the use of a passkey. Additionally, the arrest was made without a warrant, although based upon a finding of probable cause. The Court held that the arrest sanctioned by California law was:

> "...not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment. (See Page 41)".

The petitioner herein initially seeks to have this Court review the facts in order to determine that probable cause was lacking. There is no question that this Court has that power, provided there are contradictory factual questions that require its determination with respect to whether the lower court's decision as to the constitutional standard of reasonableness has been respected.

The most oft cited definition of probable cause comes from Brinegar v. United States 338 U.S. 160, 175-176 (1949) wherein the Court stated:

> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt."... And this "means less than evidence which would justify condemnation" or conviction.... Since Marshall's time, at any rate, it has come to mean more than bare suspicion; probable cause exists where "the facts and circumstances within their (the officers') knowledge, and of which they had reasonably trustworthy information, (are) sufficient in themselves to warrant a man of reasonable caution in the "belief that" an offense has been or is being committed...."

The Trial Court resolved the factual question that probable cause existed (utilizing the above definition) and the Appellate Division, Third Department, concurred.

The petitioner's contention that the New York Courts applied the wrong standard, that is, a "reasonable suspicion" standard rather than "probable cause", is not substantiated by the record. The Court's ruling on "probable cause" was based upon the constitutional standards as enunciated by this Court.

Since the lawfulness of any arrest without a warrant must in the first instance be based upon probable cause, the findings of the Court below are not in conflict. This determination does not end the petitioner's allegations with respect to the propriety of the arrest. The arrest proceedings occurred in the motel room of the petitioner, based upon a noticeless entry. The petitioner seeks to have this Court define the limits or the exceptions which would justify a noticeless entry. Such a determination on the facts in this case is not required.*

It has already been stated that this Court has permitted a warrantless and noticeless arrest made in conformity with State statutes based upon probable cause and exigent circumstances (Ker v. California, Supra). New York has a similar statute that allows for a warrantless arrest based upon certain enumerated exigent circumstances. Section 140.15 of the Criminal Procedure Law of New York allows for an arrest without a warrant and for an entry upon premises to effectuate that arrest in the same manner as would be authorized under the provisions allowing such an arrest with a warrant. In that regard, Section 120.80 (4) states as follows:

> "In order to effect the arrest, the police officer may, under circumstances and in a manner prescribed in this subdivision, enter any premises in which he reasonably believes

*The arresting officers in this case believed that at the time of their entry into the motel room to effectuate the arrest the New York State Police authorities had obtained an arrest warrant, as requested the night before.

the defendant to be present. Before such entry, he must give or make reasonable effort to give, notice of his authority and purpose to an occupant thereof; unless there is reasonable cause to believe that the giving of such notice will:

(a) Result in the defendant escaping or attempting to escape; or
(b) Endanger the life or safety of the officer or another person; or
(c) Result in the destruction, damaging or secretion of material evidence."

The courts below found that the arrest of this petitioner was properly effectuated pursuant to 120.80 (4) (b). They held that the police effectuated this arrest knowing that the defendants were fugitives from a heinous murder, that they hastily fled from the murder location near where they resided in New York to the State of Florida, that the murder weapon was still missing and that the defendants might be armed. They knew that the defendants were in the motel rooms in question and that a Doberman Pinscher was believed to be present as evidenced by the actions of one of the arresting officers, when he wrapped a towel around his arm prior to entry for protection.

There is not now, nor has there ever been, an attack by this petitioner on the constitutionality of the New York State statute. Additionally, the State of Florida, where this arrest took place, has a similar statute, and their highest Court has held that where exigent circumstances and probable cause exist, an unannounced arrest would be proper if the officer's peril would be increased if he gave notice (see Florida statutes, Section 901.17, 901.19 (1) and Benefield v. State 160 So. 2d 706 (1964)).

Numerous United States Circuit Courts of Appeals have discussed the issues involved here. The most extensive discussion can be found in United States v. Reed 572 F 2d 412, 417 (Second Cir.) cert. denied 439 U.S. 913, 99 S. Ct. 283, 58 L. Ed. 2d 259 (1978). The issue to be decided there was:

"....whether and under what circumstances the Fourth Amendment permits federal law enforcement officers to enter a suspect's home in order to effect a felony arrest for which the officers have both statutory authority and probable cause but no warrant."

The Court therein recognized that the Supreme Court has not spoken directly on that issue. After lengthy analysis, the Court concluded that in the presence of exigent circumstances, such an arrest was constitutional. The Court took cognizance of the decisions holding that the Fourth Amendment was intended to protect private citizens in the sanctity of their own homes and that freedom from such intrustions is the very purpose for which the Fourth Amendment was intended. With all of the safeguards and prior decisions in mind, the Court still held at Page 424 that:

"...in the absence of a warrant to arrest a suspect at home, and in the absence of exigent circumstances, federal law enforcement officers are prohibited by the Fourth Amendment from entering the home of a suspect to effect a felony arrest for which they otherwise have both statutory authority and probable cause."*

In the Court's determination as to whether exigent circumstances are present, they adopted the criteria enumerated in Dorman v. United States 140 U.S. App. D.C. 313, 435 F. 2d

*Conversely, the presence of exigent circumstances given the other requirements would permit a warrantless arrest.

385, 392-393 (1970) wherein the following were set forth (see United States v. Reed, Supra, Page 424):

> "These include (1) The gravity or violent nature of the offense with which the suspect is to be charged; (2) Whether the suspect is reasonably believed to be armed; (3) A clear showing of probable cause...to believe that the suspect committed the crime; (4) A strong reason to believe that the suspect is in the premises being entered; (5) A likelihood that the suspect will escape if not swiftly apprehended; and (6) The peaceful circumstances of the entry."

In Dorman, Supra, the Court also listed as another consideration the time of the entry.

Based upon the foregoing, the noticeless entry to effectuate the petitioner's arrest was valid, as it was based upon probable cause, statutory authority and the presence of each of the above listed and accepted exigent circumstances. Further, the entry by the police occurred during the morning hours (not a nighttime entry, which in this case was specifically determined not to be made).

United States v. Reed, Supra, Footnote 7 at Page 421 indicates that their decision is in accordance with the Sixth, Ninth and District of Columbia Circuits. (See United States v. Williams 604 F. 2d 1102 (1979) where the exigent circumstances of Dorman, Supra, were utilized in the Eighth Circuit.)

It can, therefore, be concluded that the petitioner's arrest was not violative of the Fourth Amendment standards of reasonableness, nor are there any conflicting decisions of other Circuit Courts of Appeals or sister states with respect to the arrest procedure.

II

> This case is clearly distinguishable from People v. Payton and Riddick 45 N.Y. 2d 300 which is currently pending before this Court.

The petitioner's contention that certiorari should be granted herein, in order to enable the Court to dispose of this case in light of its decision to be rendered in Payton and Riddick is unnecessary.

In Payton and Riddick the New York Court of Appeals decided that the police may enter the home of a defendant for the purpose of effectuating a warrantless arrest based upon probable cause but in the absence of exigent circumstances. The petitioner's case substantially differs in that exigent circumstances were present and the police acted under the good-faith belief that an arrest warrant existed at the time of their entry to effectuate an arrest based upon probable cause.

The facts of Payton and Riddick are clearly distinguishable. In Payton, when the police came to the defendant's apartment, they were present without an arrest warrant and without knowledge of the defendant's presence. In Riddick the police came to the defendant's house without a warrant for the purpose of arresting him for robberies committed two years earlier.

The petitioner was arrested in his motel room by the police for an intentional murder committed several days prior, from which the petitioner hastily fled the State of New York to Florida immediately after the commission of the crimes. An extensive police investigation established a "checkerboard

square" of evidence pointing directly at the petitioner and his co-defendant providing the requisite probable cause for their arrest. The police, acting responsibly, requested and believed that an arrest warrant existed, peacefully and without notice, entered the motel room effectuating the arrest (upon the exigent circumstances as outlined previously).

Lawrence H. Cooke, Chief Judge of the Court of Appeals for the State of New York, filed a dissenting opinion in the Payton and Riddick cases in which he questioned the majority's decision permitting the non-consentual entry in the absence of exigent circumstances and without review by a neutral magistrate on the question of a warrant authorizing the arrest. The concern expressed by Judge Cook in the Payton case involves factual situations not present here. His strong concern under the Fourth Amendment protections for a neutral magistrate's review was for all intents and purposes complied with by the police as the arresting officers believed a warrant existed. The additional concern expressed by Judge Cooke allowing an arrest of this type in absence of exigency, is not present.

The petitioner sought leave to appeal the decision of the Appellate Division, Third Department, to the New York Court of Appeals. The matter was set down for argument before Judge Cooke to determine whether leave to appeal would be granted. During the course of the argument, Judge Cooke expressed his view that this case was not the same as Payton because of the existence of exigent circumstances. Leave to appeal was thereafter denied.

The decision of the Appellate Division, Third Department,

need not be reviewed in light of this Court's decision to be rendered in Payton and Riddick, since the cases are clearly distinguishable, and this decision is not in conflict with existing Supreme Court or Federal Circuit Court of Appeals' decisions.

III

The evidence obtained from the motel subsequent to the petitioner's arrest did not contribute to the petitioner's conviction.

The Appellate Division, Third Department's decision indicated that the search of the motel may have been overbroad under the guidelines established in Chimel v. California 395 U.S. 752. The Court found that the evidence against the petitioner was so overwhelming that the items admitted at trial from the motel, if they be in error, were harmless under People v. Crimmins 36 N.Y. 2d 230.

The petitioner's contention that the Appellate Division justified the search on the basis of the confession does not have support under the facts of this case. The Court's determination was clearly an evaluation of the total evidence presented against the petitioner in light of the items received from the motel. It concluded that there was no constitutional error as enunciated in Chapman v. California 386 U.S. 18 because there was no reasonable possibility the error might have contributed to the petitioner's conviction and it was, therefore, harmless beyond a reasonable doubt.

If a search is improper, it can only have contributed to a defendant's conviction if the proceeds of the search are

utilized at the trial. An overbroad search where the items obtained are not utilized at trial certainly cannot contribute to a conviction unless additional evidence obtained can be found to be the "fruits of the poisonous tree". In the instant matter only five items of evidence were produced at trial stemming from the motel search, and the first of such items introduced was done so by the defense. Additionally, each of those items had an independent source known to the police prior to their seizure, and this was established at the pre-trial suppression hearings. These independent sources are consistent with prior holdings of this Court as exemplified in Silverthorne Lumber Co. v. United States 251 U.S. 385 (1920).

Nor can credence be given to the petitioner's allegations that had it not been for the motel search there would not be a confession, therefore, they are all "fruits of the poisonous tree" as enunciated in Wong Sun v. United States 371 U.S. 471. The defendant was lawfully arrested and taken into custody by the police prior to the inventory of his motel room. His lengthy confession was a product of that lawful arrest totally disconnected in time and place from any of the items gathered by the police from the motel.

The Appellate Division's determination with respect to the lawful arrest, the motel search, the overwhelming proof against the defendant once his lawfully-obtained confession was admitted into evidence, and the harmless error doctrine is consistent with New York Law, the Fourth Amendment of the United States Constitution and the Supreme Court cases interpreting these issues.

IV

The Trial Court's ruling of the admissibility of the petitioner's confession was not in conflict with constitutional guidelines.

The petitioner attempts to assert that the Trial Court determined that the confession was voluntary based upon the sole consideration of its truthfulness. This is an inaccurate account of the testimony introduced at the pre-trial suppression hearings and of the Trial Court's findings.

The Trial Court found in the first instance that the confession was voluntary under the constitutional protections of the Fifth and Fourteenth Amendments as being freely and voluntarily made. This aspect was gone into in depth at the hearing as it was proved that the defendant's contention of a coerced confession was not credible. The Trial Court found that this confession was not the product of any overreaching or mistreatment by the police.

The Court also determined that the confession did not violate the principles set forth in Miranda v. Arizona 384 U.S. 436 since the defendant was adequately apprised of his constitutional rights several times prior to his confession, and those rights were preserved both in writing and on a tape recording.

Additionally, the Court determined that the arrest was lawful and that the confession was not the fruits of illegal police conduct. The Court specifically reviewed Brown v. Illinois 422 U.S. 590 finding that this arrest was not investigatory, but based upon probable cause and for the purpose of prosecution.

The standard of truthfulness as complained by the petitioner herein was not the criteria utilized for admissibility. The Court considered truthfulness only with regard to the defendant's contradictory testimony at the suppression hearing when he alleged that the police coerced his confession. (RA 338-339). Nothing in that finding violates the principles as stated in Rogers v. Richmond 365 U.S. 534, 544 where the Court stated that:

> "The attention of the trial judge should have been focused, for the purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined...."

This was clearly the focal point of the trial judge here.

V

The search of the Lincoln Automobile was not in violation of the Fourth Amendment.

The petitioner contends here, as he did before the Appellate Division, Third Department, that the second entry into the Lincoln automobile was a warrantless search in violation of the Fourth Amendment protections.

Initially, the police obtained a search warrant and pursuant thereto, searched the Lincoln Continental on October 17, 1975. Thereafter, on October 20, 1975 the vehicle was again dusted for additional fingerprint evidence based upon information stemming from the defendant's confession. In that second inspection four fingerprints were developed on the inside portion of the trunk lid which were later positively identified as belonging to the victim of the homicide.

The search warrant provided for the search of fingerprint evidence from the automobile and the return of the search warrant indicated, as one of the items of property seized, the automobile itself. Additionally, immediately before and after the search, the vehicle was kept under constant surveillance by members of the New York State Police through the second inspection and even after the arrest.

In effect, the automobile was seized by the police on October 17, 1975 as evidence of the homicide pursuant to a valid and lawful search warrant. As part of the probable cause for the warrant and the reasonable inferences that flowed from the facts, the police could reasonably infer that the automobile was used in some manner in the commission of these crimes. The police certainly have the right to inspect and examine evidence that is already seized and within their control in a manner that is convenient and suitable for the purpose of their investigation. Whether these items of evidence are examined once or numerous times does not in any way invalidate the already lawful seizure and only the legality of the initial seizure is in question, and that has already been ruled as proper.

This fact situation is clearly distinguishable from Mincey v. Arizona __U.S.__ 98 S. Ct. 2408 (1978) where the police conducted an exhaustive four-day warrantless search of the apartment where the defendant was arrested under the guise of a "murder scene exception". The Fourth Amendment here was fully complied with by a neutral magistrate issuing a proper warrant and pursuant thereto, evidence was seized. Its subsequent reinspection for additional information is not a second

entry that can be viewed as a warrantless search as alleged by the petitioner.

CONCLUSION

For the reasons stated herein, the petition for Writ of Certiorari should be denied, in all respects.

Dated: Liberty, New York
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